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No. 08-41

Supreme Court, U.S.
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In the Supreme Court of the United States

WILLIAM DUPRE,

Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner failed timely to invoke the reasonable procedural mechanism provided by Ohio law for claiming bias of an appellate judge.

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This case presents no grand questions of due process, the effect of campaign contributions on judicial impartiality, or conflicting rules of law among the several states. It simply involves the unobjectionable requirement under Ohio law that a litigant raise a claim of judicial bias in a timely fashion. Petitioner failed to do so. Further, even if Dupre had not defaulted his claim in state court, the claim is so factually tenuous that it provides a poor vehicle for this Court to consider the constitutional implications of campaign donations of judicial candidates. This Court should deny certiorari.

STATEMENT

Petitioner William Dupre alleges that he is a victim of "appellate nullification" (Pet. 11), and raises the specter of impermissible judicial bias caused by contributions from interested parties to the campaign coffers of state judicial candidates. In truth, Dupre received all of the process to which he was due. After losing on appeal and at the Ohio Supreme Court, Dupre (and his co-party below, Smart Media, Inc., which appears to have chosen not to pursue a petition for a writ of certiorari) stood silent for nearly a year.

Then, in January of 2007, Smart Media filed a motion to vacate the appellate judgment under Ohio Civil Rule 60. Dupre joined in that motion and filed his own motion for leave to file an untimely motion for reconsideration. Both motions argued that Judge Batchelder -- who had written the majority opinion for the Ohio intermediate appellate court (Ninth Judicial District) overturning a jury verdict for Smart Media and Dupre and awarding judgment to defendants Telxon and Symbol (respondents in this

Court) -- was biased due to campaign contributions by Robert Meyerson, the former CEO of Telxon, to his local Republican Party.[1]

The Ohio Supreme Court appointed an independent panel of state appellate judges from outside the Ninth District to decide the motions. The panel majority applied Ohio Supreme Court precedent in ruling that (1) the Ohio Appellate Rules governed procedure in the courts of appeals, and the Civil Rules were "clearly inapplicable to review the court's judgment on appeal," Pet. App. 6a, *citing Martin v. Roeder*, 665 N.E.2d 196 (Ohio 1996), and (2) that Dupre had failed to show the "extraordinary circumstances" required to extend the deadline for filing a motion to reconsider under the appellate rules. Pet. App. 8a; *see also* Ohio App. R. 14(B) ("Enlargement of the time to file an application to reconsider pursuant to App. R. 26(A) shall not be granted except on a showing of extraordinary circumstances."). Specifically, Dupre's motion came nearly a year after the Ninth District filed its decision, despite the fact that the grounds for his motion -- Meyerson's contributions to his local Republican party -- were a matter of public record well before and during the proceedings below.

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[1] The underlying action arose from a business dispute between Smart Media (which employed Dupre) and Telxon that resulted in a lawsuit wherein Smart Media and Dupre obtained a $218 million jury verdict. The appellate panel was unanimous that the verdict should be overturned; it was divided only regarding whether to grant judgment to the defendants (as the majority concluded) or to order a new trial (as the dissent concluded). The Ohio Supreme Court denied review.

Dupre then filed an appeal in the Ohio Supreme Court. That court declined jurisdiction and dismissed the appeal as not involving any substantial constitutional question. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

The Ohio court below reasonably ruled, under state law, that Petitioner procedurally defaulted any claim of judicial bias. Petitioner has failed to establish any constitutional violation or to identify a split of authority between state courts of last resort. The petition should therefore be denied.

I. PETITIONER'S PROCEDURAL DEFAULT DOES NOT AMOUNT TO A DENIAL OF DUE PROCESS.

The sole reason for the Ohio courts' denial of Dupre's claim of judicial bias is his failure to follow reasonable procedural rules under state law. The Ohio Constitution gives the Chief Justice of the Ohio Supreme Court authority to "pass upon the disqualification of any judge of the courts of appeals ...." Ohio Const. art. IV, § 5(C). A party seeking to disqualify a judge for the judge's alleged interest in the proceedings may invoke this authority by filing an affidavit of disqualification with the clerk of the Ohio Supreme Court. Ohio Rev. Code Ann. § 2501.13 (West 2007); *see also* Ohio Rev. Code Ann. § 2701.03 (West 2007). Filing an affidavit of disqualification is the sole means of claiming that a judge was biased. *See State v. Hunter*, 783 N.E.2d 991, 995 (Ohio App. Ct. 2002) (citing cases). Dupre never filed an affidavit of disqualification for Judge Batchelder.

Instead, Dupre joined in Smart Media's motion to vacate the appellate panel's merits decision (overturning the jury verdict) under Ohio Civ. R. 60(B) and added his own motion under Ohio App. R. 26(A) and 14(B) for leave to file an untimely motion for reconsideration of the decision. Ohio precedent clearly establishes that Civil Rule 60(B) is "inapplicable to review the [appellate] court's judgment on appeal," for the simple reason that "[t]he Rules of Appellate Procedure govern appeals[.]" *Martin v. Roeder*, 665 N.E.2d 196, 197 (Ohio 1996). The panel majority below did nothing more than correctly apply this controlling precedent.

The panel majority below also correctly denied Dupre's motion for leave to file an untimely motion for reconsideration. Under the Ohio Appellate Rules, motions for reconsideration "must be filed within ten days after filing of the judgment or the announcement of the court's decision, whichever is later." *Id.* An extension of the ten-day deadline is allowed only if the movant shows "extraordinary circumstances." Ohio App. R. 14(B). Dupre's motion came nearly one year after the Ninth District filed its decision. Contrary to Dupre's contention that "[t]he majority [of the second appellate panel] as much as admitted that [he] had established extraordinary circumstances" (Pet. 23), the panel only acknowledged Dupre's contention to that effect. In fact, extraordinary circumstances were plainly absent because Dupre filed his motion nearly a year after the Ninth District filed its decision, despite the fact that the grounds for his motion -- Meyerson's contributions to his local Republican party -- were a matter of public record before and during the proceedings below.

The decision of the state court thus is not a denial of due process, but a straightforward application of state-law procedural rules that does not present a federal statutory or constitutional question warranting this Court's review.

II. THERE IS NO SPLIT OF AUTHORITY AMONG THE STATE COURTS OF LAST RESORT SUFFICIENT TO GIVE RISE TO JURISDICTION.

The cases Dupre cites to show a split in authority among the state courts of last resort are distinguishable both on their facts and on the controlling law. Most notably, none involved a litigant, like Dupre, who failed timely to pursue remedies under state law.

The primary case Dupre cites is *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001). In *Pierce*, the Oklahoma Supreme Court found that a judge's impartiality might reasonably be questioned as the result of contributions to the judge's election campaign, *id.* at 798, and that due process was denied where a judge whose impartiality might reasonably be questioned was not disqualified. *Id.* at 799. But unlike Dupre, the appellant in *Pierce* followed the proper procedure for disqualifying a judge and appealing the denial of that disqualification. *See Pierce*, 39 P.3d at 794-96 (discussing disqualification procedure and determining that appellant was in compliance). The *Pierce* court specifically refused to address a situation where, as here, a party failed to follow the proper procedure for disqualification of a judge, or speculate

as to where such failure might be excusable. *Id.* at 796.[2]

Dupre cites (Pet. 23) three other cases: *Tesco American, Inc. v. Strong Inds., Inc.*, 221 S.W.3d 550 (Tex. 2006); *Powell v. Anderson*, 660 N.W.2d 107 (Minn. 2003); and *Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988). None of these cases involved a procedural default, and -- as to the merits -- none deals with whether contributions to judicial election campaigns warrant disqualification.

III. EVEN ASIDE FROM PETITIONER'S PROCEDURAL DEFAULT, THIS CASE IS A POOR VEHICLE FOR THIS COURT'S REVIEW BECAUSE THE EVIDENCE OF BIAS WAS PLAINLY INSUFFICIENT.

Even aside from Dupre's failure to adhere to reasonable Ohio procedural rules, his claim of judicial bias is so attenuated that it presents an extremely poor vehicle for this Court to take up the questions of whether and when the U.S. Constitution requires that judges who have received campaign contributions must be disqualified.

Dupre points to numerous contributions by Robert Meyerson, the former CEO of Telxon,[3] to the

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[2] Also in contrast to *Pierce*, Judge Batchelder was never a candidate for office during the pendency of Dupre's appeal, and Dupre has presented no evidence that Meyerson ever contributed to Judge Batchelder's campaign for the appellate bench.

[3] Meyerson left Telxon in 1997. Telxon commenced this action in December of 1998. Pet. 6. While Meyerson testified at trial, he was not a party.

Summit County Republican Party. These contributions, along with a subsequent contribution from the county party to Judge Batchelder's judicial campaign in 2000, supposedly serve to establish Judge Batchelder's bias in favor of Telxon.

All but one of the contributions Petitioner cites, however, were not to Batchelder, but to his local Republican Party, which then spent some of its coffers on judicial elections. The single contribution made directly from Meyerson to Batchelder was for Batchelder's 1996 campaign *for legislative office.* This donation came two years before Telxon filed its action for declaratory judgment, four years before Judge Batchelder was elected to the court of appeals, and nearly a decade before the 2005 decision that Petitioner claims was the product of Judge Batchelder's desire to favor a political patron.

To rule that such contributions require disqualification of the judge would essentially mean that every elected judge must be disqualified from hearing cases that touch on major donors to their party, no matter how remote the connection. Dupre implies as much by complaining that "Chief Justice Moyer, a Republican, appointed a panel of ... two Republicans and one Democrat" to hear his case after the judges of the Ninth District Court recused themselves to avoid the appearance of partiality. Pet. 8. Accepting Dupre's theory would effectively end partisan judicial elections altogether, a course this Court declined to take in *Republican Party of Minnesota v. White*, 536 U.S. 765, 782-83 (2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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